MISC. CIVIL APPLICATION NO.34 OF 1996

Date of decision: 1st March 1996

For Approval and Signature:

The Hon'ble Mr.Justice N.J.Pandya

The Hon'ble Mr.Justice A.R.Dave

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India..

thereunder?

5. Whether it is to be circulated to the Civil Judge?

Mr.Vithalbhai Patel, Learned Sr.Counsel with L.A. Mr.D.G.Chauhan for the petitioners

Mr.M.D.Pandya, L.A. for the respondents

Coram: N.J.Pandya & A.R.Dave,JJ.
March 1,1996

C.A.V. JUDGMENT (Per N.J.Pandya,J.)

The petitioners are respectively a private limited company and its Director. They have invoked the jurisdiction of this Court under the Contempt of Courts

Act on the basis that the respondent-Gujarat Electricity Board (hereinafter referred to as "the Board") and its Officers are willfully and deliberately flouting the order of this Court given in Special Civil Application No.5261 of 1995.

2. The said Special Civil Application was filed against the Board and its Officers disputing the claim of the Board as to the dues of disconnected electricity connection which was given by the Board to Messrs Hazari Ispat Limited. It is an undisputed position that the said old connection was given in the very premises which is now occupied by petitioner no.1 Company. It came to occupy the same as a result of auction purchase knocked down in its favour as Messrs Hazari Ispat Limited, failed to pay its dues.

3. Our learned colleague S.M.Soni, by his order dated 11-5-1995, allowed the said Special Civil Application. For this purpose, the petitioner was relying on Messrs Isha Marbles vs. Bihar State Electricity Board and ots. reported in Judgment Today 1995 (2) SCC 626, its equivalent being 1992 (2) SCC 648. There is a Gujarat Judgment also reported in 1995 (1) GLR 196. The Honourable Supreme Court, in its pronouncement, has held that the dues of previous owner of the unit cannot be asked for from the purchaser by the Board unless the board is able to show that the purchaser has practised dishonesty. If the purchaser has no connection or relationship with the previous owner, the liability of the previous owner cannot be fastened on the new purchaser.

4. In the final order, therefore, the learned Judge was pleased to quash and set aside the demand of dues of the previous owner made upon the present petitioners and further respondent no.1 was directed to supply the requisite electric power to the petitioners on satisfying other requirements of the Board.

5. As a result, the exercise of giving connection which is H.T.connection of 1800 KVA in the premises now occupied by petitioner no.1 Company was initiated. This resulted into a response from respondent no.1 Board in form of Annexure M page 44 dated 23rd November 1995. No doubt, this was preceded by other correspondence as well, which will be referred to as and when necessary. In the said communication page 44, Annexure M, estimates are given in two parts, part A and part B. In part A, there is an estimate of Rs.4.77,670/- made by the Board under different headings, as set out therein at page 51. In

part B there is a reference to sum of Rs.42,760/- as detailed out at page 52. Upto this, there is no dispute between the parties. In other words, the petitioner is willing to pay the sum of Rs.4,77,670/- and Rs.42,760/-both. The dispute relates to the demand of Rs.16,20,000/- made by the Board under the heading of augmentation charges. These charges are claimed towards augmentation of sub station from its present capacity of 20 MVA to 30 MVA at the rate of Rs.900/- per KVA. While the Board is augmenting the capacity by 10 MVA, it is making demand of Rs.16,20,000/- on the petitioners for 1.8 MVA only at the ate of Rs.900/- per KVA.

6. The petitioners have, in no uncertain terms, clearly stated in the petition that the Board having failed to get its dues of the previous owner from the petitioners, by virtue of the said order of this Court, it is now trying to get that amount under the heading of augmentation charges. This is, therefore, according to the petitioners, a clear case of willful and deliberate disobedience of the order of the Court.

7. The second limb of argument is that on the basis of the aforesaid Isha Judgment looking to the provisions of the Indian Electricity Act 1910(hereinafterreferred to as "the Electricity Act")and the Electricity Supply Act 1948 (hereinafter referred to as "the Supply Act"), the said demand of augmentation charges is ex facie illegal, null and void. This would also, according to the petitioners, amount to contempt.

8. For the first limb of argument, learned Sr.Counsel Mr.V.B.Patel has drawn our attention to the date of the said order of Justice Soni which is 11-7-1995. According to Mr.Patel, though the application forms were sent by letter dated 9-8-1995, Annexure J, page 39, instead of sticking to the time limit of one month, under the provisions of the Electricity Act and the Supply Act, the Board has taken its own time solely with a view to see that the petitioner does not get connection and in the meantime, the Board can force it to pay extra amount under different heads which the Board was very much bent upon recovering as it wanted to recover the unpaid dues of the previous connection holder. In other words, according to the petitioners' the Board deliberately delayed its response, so that the petitioners being in dire need of the connection would succumb to this pressure tactic and thereby the Board would succeed in getting indirectly what it could not get directly.

9. In this connection, affidavit in reply of Mr.C.B.Kanitker, General Manager (Commerce) filed on behalf of the Board page 57 onwards is quite clear and so is the position of correspondence resting with the last letter written by the petitioner through its General Manager on 27-12-1995 page 91. The Board has never refused to give connection. All it insisted upon was the payment of said augmentation charges. The Board, initially, had, no doubt, insisted upon the petitioners to pay the charges of service line, but thereafter, it realised that only a link line to the extent of 200 metres is missing and therefore it revised its estimate and finally it scaled down its estimate for the purpose of 200 metres only and that is how the said part A and part B pages 51 & 52 came to be sent to the petitioners by the Board. So far as the first limb of argument is concerned, in our opinion, the petitioners have no case. Now, comes the question of augmentation charges.

10. At this stage, we would like to make it clear that exercising the power under the Contempt of Courts Act, we would not enter into the larger question of the validity or otherwise of the demand of augmentation charges. We are of the opinion that this question is much too complicated and if at all is required to be gone into, it requires complete data to be supplied by both the sides more particularly by the Board and by way of a substantive petition only the question of Board asking for augmentation charges, its validity, its virus etc. can be gone into. We will, therefore, be confining ourselves only to the question whether this demand of the Board is ex facie illegal, null and void and therefore, it is nothing else, but a pretext under which the Board is refusing to supply energy and thereby it amounts to contumacious flouting of the order of the Court. The learned Counsel Mr.V.B.Patel has, ofcourse, laid great emphasis on this aspect of the matter, while also arguing that the action on the part of the Board to ask for augmentation charges is ex facie illegal and ultra vires.

11. For this purpose, the corner stone of the petitioners' case is the said Isha Marbles Judgment. No doubt, Sections 24 & 22-A(3) read with Sch. VI of the Electricity Act and Sections 26, 79(j) and 40 of the Supply Act along with the provisions of the State Financial Corporation Act 1951 were very much considered by the Honourable Supreme Court. This is so, because the respondent Bihar State Electricity Board, in that case, had come out with a submission that by virtue of the said provisions of the Supply Act inspite of the clear wording of Cl.VI and alternatively because of those provisions

even by virtue of Clause VI, the Board could have insisted upon the payment of the dues of the previous connection holder. Paragraph 56 of the Judgment at page 663 as reported in 1995 Vol.2 SCC 648 in our opinion, gives crux of the matter. That paragraph reads as under:

> "From the above it is clear that the High Court has chosen to construe Section 24 of the Electricity Act correctly. There is no charge over the property. Where that premises comes to be owned or occupied by the auction-purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. Ofcourse, the bona fides of the sale may not be relevant"

Essentially, therefore, it is a matter of contract which has been dealt with by the Honourable Supreme Court. In the aforesaid paragraph, it has been clearly held that the Board cannot seek the enforcement of contractual liability against the third party. Obviously, there is absence of privity of contract between the purchaser and the Board in respect of the dues of electricity connection obtained by the previous owner of the property. It is a contract between the said holder of connection and the Board and the liability flowing therefrom cannot be fastened on a purchaser, who had nothing to do with that contract.

12. However, as elaborate arguments were advanced on the basis of various provisions both of Electricity Act and the Supply Act, the Honourable Supreme Court has dealt with those arguments and in relation to the dues of the previous customer, it has, without any difficulty, held that clause VI of the Schedule to the Electricity Act and Sec.49 of the Supply Act do not empower the Board to insist upon the dues of the previous customer.

13. However, the dues of a previous customer based on a contract with the Board and the said previous customer is one thing and charges to be levied while dealing with an application for reconnection of that very electric service which came to be disconnected on account of non payment of electricity dues by the previous holder of connection is altogether a different thing.

14. The previous owner till the given date was being supplied with energy pursuant to his contract with the Board. After the contract came to be terminated and till the new purchaser came on the scene with a request for reconnection, things could not have remained static. This is exactly what the Board has tried to point out in its affidavit in reply page 67 onwards.

15. Page 90 gives the details of load committed to be catered from 66/11 KV Khakharia sub-station prior to the receipt of the petitioners' application. This has prompted the Board to take a stand that substation having capacity of 20 MVA has to be augmented to the extent of 30 MVA because to ensure adequate voltage and uninterrupted supply, it has to have safety margin of 20%. Inspite of the proposed augmentation of 30 MVA, therefore, the said margin of 20% would leave only 24 MVA to be drawn upon by the Board as and when it is required to honour its commitment to its customer which include the petitioners as well as those listed at page 90.

16. Arithmetically, in this calculation of the Board, no issue is joined. What has been insisted upon is that in the very premises now purchased by the petitioners, when for the previous connection holder, entire line was drawn up right from High Tension line of 60 KV to step down High Tension Line of 11 KV to actual supply of energy at 440 V. nothing else is required to be done by the Board except to complete the missing link of 200 metres of the service line and thereby to fulfill its obligation under the Act. The petitioners' submission is short and simple. It says that in view of the aforesaid existing facility already available i.e. establishment of sub station, drawing up of necessary line right upto the metre board to the extent to which on account of disconnection new wires are to be drawn, nothing else is required to be done by the Board and hence, augmentation charges ex facie are unwarranted etc.

17. Had this been the position, immediately on disconnection, one could have factually appreciated the same. However, on account of passage of time and particularly with reference to the said commitment as set out at page 90, obviously, things have altered radically. Even if there had been lesser number of people or proposed customers in whose favour power is committed to be given, the situation would have certainly operated in favour of the petitioners. This could have easily been the position, if after providing for 20% safety margin as per the original installed capacity of 20 MVA, there was

surplus of upto 20 MVA from which power needs of the customers including the petitioners could have been met with. As stated earlier, the affidavit in reply and its accompanying documents clearly point out that the present situation is different than what the petitioners contemplate it to be and the safety margin was to be maintained along with the demand to be met with of the petitioners and other persons clearly for augmenting the capacity of the sub-station from 20 MVA to 30 MVA. There also, as mentioned earlier, the petitioner is required to pay augmentation charges for his demand of 1800 KVA only i.e. 1.8 MVA at the rate of Rs.900/- per KVA.

18. Over and above the said Isha Marbles Case, the learned Counsel Shri Patel had also relied on Section 21 of the Electricity Act and more particularly sub-Section 2 thereof. It lays down that a licensee may impose conditions not inconsistent with this Act or with his licence, but only after the sanction given by the State Government and likewise, a licensee may recall his relations with its consumer with the like sanction.

19. The learned Counsel further submitted that according to Sec.26 of the Supply Act, the Board is made, subject to the same obligations as a licensee would be, under the Electricity Act. No doubt, the said Section does provide that the supply Act shall be deemed to be a licence to the Board for the purposes of the Electricity Act.

20. It was, therefore, submitted by the learned Counsel Mr.Patel that with regard to the augmentation charges, unless a sanction has been obtained by the respondent-Board from the State Government, the petitioner cannot be compelled to pay the same. This would again be one more ground in support of his submission that the demand of augmentation charges is ex facie illegal, null and void. In this background, the learned Counsel further read the said clause VI which has reference to Clauses IV & V of Schedule to the Electricity Act. It enjoins upon the licensee to supply within one month electric energy on a consumer making the requisition subject to certain exceptions provided therein which, as admitted on all sides, are not attracted in the instant case. Corresponding obligation on the consumer, set out int he proviso, is also read by the learned Counsel.

21. Said Clause VI also refers to the obligation of

the licensee to bring the service line upto the destination and provides for charges that can be levied by the licensee for the purpose. In the course of various provisions, the said clause VI has clearly laid down that upto first 100 feet from the metre Board, no charges will be levied on the consumer. Then there is a reference to service line distribution and other concept necessarily to be kept in mind and regulared for the purpose of regulating the relations between the consumer and the licensee. Among other things, Clause VI also provides that the licensee shall get annual revenue not exceeding 15% per annum of the cost of the distributing mains required to comply with the requisition.

22. Further developing the argument, the learned Counsel, after reading Clause V, submitted that the aforesaid Revenue is to be calculated only with reference to the distributing mains and the service lines as the case may be, which will not include transformers and other substation equipments.

23. In short, the submission of the learned Counsel Mr.Patel was that the Board is trying to do indirectly what it could not do directly taking recourse to the got up demand of augmentation charges. The learned Counsel was meticulous enough to give us the contensed version of his arguments where the points were very well summarised.

24. In reply to this, L.A. Mr.Pandya appearing for the Board had straightaway read proviso to Sec.26 and before that he had read Sub-Section 6 of Sec.2 of the Supply Act. He refers to this Section 26 and says that notwithstanding the mention in Sec.26, the Board is not a licensee under part II of the Indian Electricity Act, 1910.

25. The said proviso to Section 26 excludes the operation of Sections 3 to 11, Sub-Sections 2 & 3 of Section 21 and other Sections which are not relevant and particularly clauses 9 to 12 of Schedule, all to be found in the said Electricity Act.

26. Sub-Sections 2 & 3 of Sec.21 of the Electricity Act was heavily sought to be relied upon by the learned Counsel Mr.Patel, as there only, it is to be found that any condition sought to be imposed by the licensee upon the consumer, if not sanctioned by the State, shall be null and void.

27. In this background, if Section 26 along with Sec.49 of the Supply Act as well as Section 17 read with Sec.79(j) are taken into consideraton, it has to be held so far as the complaint as to committing contempt of Court is concerned, that the Board has a prima facie case in answer to the said complaint and therefore, there is no possibility of holding that there is a willful disobedience of the order of the Court.

28. As to the general grievance made by the petitioner that the Board did not respond to his request for electric supply within the stipulated period of one month, the submission made on behalf of the Board is that on receipt of letter dated 3-5-1995 Annexure B page 21, the Board by its letter dated 9-5-1995 Annexure C page 22 forwarded the prescribed form and also set out certain other conditions. A copy of that letter was forwarded to ammong other functionaries of the Board to its Halol office so that the Executive Engineer there, can sent technical feasibility of the proposal to catre 1800 KVA HT power to the petitioner. The petitioner, no doubt, responded by letter dated 12-5-1995, Annexure D-page 24 and as can be gathered from Annexure F page 28 written by the petitoner on 4-7-1995 to the Board in response to its letter dated 14-6-1995 as also letter dated 7-7-1995 Annexure F page 29 and so on, the correspondence continued. There, again, GEB, Halol was requested to complete certain formalities. In our opinion, therefore, it is not possible to say that the Board has not attended to the petitioners' request in time. In fact, the prescribed form was filled in as per Annexure 33 on 28-7-1995 and the possession of the premises was taken by the petitioners only after 13-7-1995.

29. As noted earlier, we are not entering into the question whether the Board can insist upon payment of augmentation charges validly and therefore, constitutional provisions including Articles 14 and 19 referred to in the course of the argument on behalf of the petitioner are mentioned only because they were urged and we are not dealing with them here.

30. The learned Counsel Mr.Patel had relied on 1993 SCC 279 in order to show as to how a public body is supposed to act. The standard of fairness, uniform treatment, propriety etc. are expected of them. There cannot be any dispute as to the Board falling into that very category, as was the body in relation to which the said Supreme Court pronouncement has been made. That

judgment relates to conduct of a Financial Corporation under the State Financial Corporation Act, 1951.

31. However, if the said decision is sought to be relied upon as was done in the course of the argument, that Section 49 refers to uniformity of tariff and therefore, the Board should show its fairness even while insisting upon imposing the condition. Reading Section 49 makes it clear that it refers to conditions other than tariff also. So far as the tariff is conerned, uniformity has to be expected and that is exactly what the Board has done in publishing conditions and miscellaneous charges for supply of electrical energy, as amended upto 1-1-1995.

32. AIR 1960 SC 1191 has been relied upon on behalf of the petitioner and particularly the observations of the Honourable Supreme Court, as contained in para 6 thereof at page 1194. It lays down that if the Act (Motor Vehicles Act 1939) had intended to give the power to the State Government to vary the conditions of a stage carriage permit granted to a particular person it would have specified such a pwoer in this section. Section 48A of the Motor Vehicles Act provides for variation of any condition and the State Government is not the authority for the purpose.

33. In view of Section 49 read with other Sections referred to above, in our opinon, this authority does not help the petitioners.

34. So far as Section 49 is concerned, it was a subject matter of scrutiny before the Honourable Supreme Court as reported in AIR 1993 SC 2205 relied on by the Board. Section 49 was read to contain two powers - (1) the prescribed terms and conditions of supply and (2) to fix the tariff. It was submitted, at the bar, before the Honourable Supreme Court that Section 49 gives untremalled power to the Board and therefore, guidelines be prepared. This contention was negatived because the conditions to be notified under Sec.49 was held, of necessity relating to the object and purpose for which they are issued. Section 49 read with Sec.18 of the Supply Act makes it clear that condition has to be for proper and efficient utilisation of electrical energy in the State. Augmentation for the purpose of ensuring proper and adequate supply of electricity to the petitioner and other consumer can well be in accordance with the provisions of the Act particularly Sec.18 read with Sec.49 and other Sections referred to earlier of the Supply Act.

35. Lastly Mr.Pandya has relied on AIR 1988 Karnataka 178 where under Sec.49 read with Sec.79(j) Electricity Board of Karnataka had insisted upon production of certificate from the concerned local authority that the construction where supply is sought, is an authorised one. Challenge to this condition was negatived by the learned single Judge of Karnataka High Court, as it was held to be within the competence of the Board with reference to Sec.49, 26 and 79(j) of the Supply Act.

36. Before parting with the matter, we may refer to one more submission of learned Counsel Mr.Patel which is in connection with said Clause VI of Schedule to the Electricity Act. It has already been noted that by virtue of Sec.26, Clauses 1 to V do not apply to the Board. Clause VI does have a reference to clauses IV and V of that Schedule. Therefore, an attempt was made to base the submission that to the extent to which these clauses are referred to in Clause VI, they have to be kept in mind for the purposes of compelling the Board to act according to Clause VI. A look at Section 26 and more particularly second proviso, in our opinion, makes it clear that no such exercise is necessary. Clause VI of Schedule to the Electricity Act shall apply to the Board only in respect of that area where distribution mains had been laid by the Board and the supply of energy, through any of them, has commenced. The term "Distributing Mains" has been defined in the Electricity Act and it means "portion of any main with which a service line is or is intended to be immediately connected". That is why, with affidavit in rejoinder on behalf of the petitioners, a rough sketch of electrical system line diagram was given. However, that is neither here nor there. The reason is that the Board is not disputing the existence of the distributing mains as well as the line drawn therefrom till the destination i.e. the petitioners' premises. The Board also admits that only a link line of 200 metres is to be redrawn and therefore, charges for that alone have been asked for among other charges. Augmentation being totally a different thing as dealt with hereinabove, would not be within the concept of distributing mains and hence, no grievance on that score would survive so far as the contempt proceedings are concerned.

37. The net result therefore, is that the petition fails and it is rejected at this admission stage with no order as to costs.

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